87-1694

No.

In the

Supreme Court of the United States

October Term, 1987

TED ROSE,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT, DALLAS, TEXAS

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QUESTIONS PRESENTED FOR REVIEW

1. Is the Texas Securities Act unconstitutionally vague, as applied in this case?

2. Were the Petitioner's Fifth Amendment rights violated by the State's use as evidence at his trial of proof that he had committed a crime for which he could not be convicted because of limitations?

3. Were the Petitioner's Fourteenth Amendment rights violated by the Texas Court's refusal to apply the Texas statute of limitation prospectively.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutions:

Statutes:

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Ted Rose, Petitioner, petitions for a writ of certiorari to review the judgment of the Texas Court of Appeals for the Fifth Supreme Judicial District in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a) is reported at 716 S.W.2d 162.

JURISDICTION

The judgment of the court of appeals was entered on 13 August 1986. App. A, *infra*, 1a. A motion for rehearing was

denied without written opinion on 23 September 1986. App. A, *infra*, 1a. A petition for discretionary review was refused by the Texas Court of Criminal Appeals on 13 February 1988. On March 15, 1988 Mr. Justice White extended the time within which to file a petition for writ of certiorari to 12 April 1988. App. B, *infra*, 1b.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1237(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in relevant part:

> . . .[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . .

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in relevant part:

> . . . [N]or shall any State deprive any person of . . . liberty, or property, without due process of law . . .

The Texas Securities Act (Tex.Rev.Civ.Stat. art. 581-1 *et seq.*) provides in relevant part:

> The terms "fraud" or "fraudulent practice" shall include . . . any intentional failure to disclose a material fact . . .

Art. 581-4(F); and

> Any person who shall:
>
> * * *

> In connection with the sale, [or] offering for sale . . . of . . . any security . . . directly or indirectly . . . engage in any fraud or fraudulent practice . . . is guilty of a felony and upon conviction shall be imprisoned for not less than 2 nor more than 10 years, fined not more than $5,000.00, or both.

Art. 581-29(c)(in effect in 1985).

STATEMENT OF THE CASE

The Petitioner was president of First Texas Petroleum, Inc. (First Texas), a company that engaged in oil and gas production. In November 1980, First Texas formed the Archer No. 1 Limited, a limited partnership with five investors that was organized to drill oil wells. In January 1981, First Texas, acting as the general partner of Archer No. 1 Limited, obtained a bank loan that was secured by a conveyance of the leasehold interest and drilling equipment owned by the Archer No. 1 Limited.

On 5 November 1981, Dr. Popkess purchased one of the five limited partnership interests in Archer No. 1 Limited from one of the original investors. Dr. Popkess testified that at the time he made such purchase he had not been told that the leasehold interest and drilling equipment owned by the partnership had been pledged as collateral for a bank loan.

In mid-1982 payments on the bank loan ceased, and the bank foreclosed on Archer No. 1 Limited.

On 28 June 1985, a Dallas County grand jury indicted the Petitioner upon four counts of Texas Securities Act violations, all involving Dr. Popkess' purchase of an interest in the Archer No. 1 Limited. A jury convicted the Petitioner of securities fraud for intentionally failing to disclose to Dr.

Popkess a material fact, to-wit: that the leasehold and equipment owned by Archer No. 1 Limited had been pledged as collateral to secure a bank loan.

The constitutionality of the statute

At the trial level and on appeal, the Petitioner challenged the constitutionality of article 581-29(C) on the grounds that it was vague and overly broad, as applied in this case, because the use of the statutory definition of "fraud" resulted in a failure to give the Petitioner fair notice that his conduct violated the statute.[1] The Court of Appeals concluded that article 581-29(C((1) was not unconstitutionally vague because "[v]iewed in light of common understanding and practices in selling securities, any seller of securities would be 'well aware' that the existence of a mortgage is a material fact which should be disclosed." *Rose v. State, supra,* 716 S.W.2d at 167, App. A. pp. 8a-9a.

Extraneous offense

Prior to trial, the Petitioner challenged the trial court's jurisdiction to act in this case on the ground that prosecution of the Petitioner was barred by the applicable statute of limitation. See note 1, *supra*. Such challenges were uniformly overruled.

In his Petition for Discretionary Review filed with the Court of Appeals, the Petitioner argued that the prosecution's proof that he committed an offense for which a conviction was barred by limitation, violated his rights under the Fifth Amend-

[1]See Defendant's Motion to Set Aside Indictment and Defendant's Second Motion to Set Aside Indictment, Vol. 1, Record on Appeal, pp. 15-21, each of which were denied by the trial court.

ment. *Petition for Discretionary Review* 10-11. The Court of Appeals did not respond to the argument.

Limitation

Prior to 1 September 1983, the period of limitations applicable to Securities Act cases was three years. On that date, the Texas Legislature enacted Tex.Rev.Civ.Stat. art. 581-29-1 creating a five-year period of limitation for violations of article 581-29(C).

The Petitioner unsuccessfully challenged the trial court's jurisdiction in this case arguing that prosecution was barred by the three-year statute of limitation. See note 1, *supra*. The Court of Appeals concluded that the new, five-year period of limitation applied to the Petitioner's case, the same having been enacted before the offense charged was barred by the three-year limitation period. *Rose v. State, supra*,716 S.W.2d at 165, App. A, p. 4a.

REASONS FOR GRANTING THE PETITION

This case presents three important questions that involve the constitutionality of a Texas criminal statute; whether, consistent with the Fifth Amendment's guarantee against double jeopardy, the prosecution may use as evidence at an accused's trial proof that he committed an offense that is barred by limitations; and whether the application of state statutes of limitation are subject to due process considerations, and, if so, whether the Texas court has properly construed and applied an applicable statute of limitations in this case.

Constitutionality of the statute

The Petitioner contends that under the facts of this case the definition of "fraud" contained in the Texas Securities Act is so vague and overbroad as to render the resulting conviction unconstitutional. He argues here, as he did below, that the statutory definition of fraud used in this case, viz., an intentional failure to disclose a material fact, failed to furnish a person of ordinary intelligence with sufficient notice, as required by the Fourteenth Amendment, and permitted his conviction for conduct which, under the existing facts, lacked the type of culpability normally required in criminal statutes.

"It is well established that vagueness challenges to statutes that do not involve First Amendment freedoms must be examined in light of the fact of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550 (1975). To pass constitutional muster, it is essential that the law give fair notice to the individual that the conduct for which stands convicted offends the statute so that he may, by reading the statute, conform his conduct to the requirement of the law. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). Mathematical precision with respect to the language used in the statute is not required; it is only necessary that the language of the statute give sufficient notice of the required conduct to permit one who would avoid its penalties to do so, and to guide judges in applying it and the lawyer in defending one charged with its violation. *United States v. Powell*, 423 U.S. 87, 94 (1975); *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952). The ultimate question in such cases is whether, under the facts, the law provides clear notice of a reasonably ascertainable standard of conduct required of the accused, or whether an individual is forced to speculate, at peril of conviction, whether his conduct is prohibited. *Dunn v. United States*, 442 U.S. 100, 113 (1979).

The conduct for which the Petitioner was convicted, as set out in the indictment, is intentionally and knowingly failing to disclose a material fact during the course of a sale of a security for the purpose of inducing the sale of the security. The evidence established that Dr. Popkess purchased his interest in Archer No. 1 Limited from a third person, not from the Petitioner. It was also shown that before that purchase was consummated, the Petitioner did not advise Dr. Popkess that the assets of Archer No. 1 Limited had been pledged to secure a bank loan. Dr. Popkess testified that such pledge was a "material fact" as far as he was concerned because had he known of the pledge he would not have purchased the Archer No. 1 Limited interest.

Against this factual backdrop, the trial court instructed the jury *inter alia* as follows:

> The term "fraud" or "fraudulent practice" means any intentional failure to disclose a material fact.
>
> A material fact is one that a reasonable man would attach importance to in determining his choice of action in the transaction in question. In the terms of this case, a material fact is one that a reasonable man would deem important in determining whether or not to purchase the security.

Record on Appeal, vol. 1, p. 119. Thus, by these instructions, the jury was permitted to convict the Petitioner of fraud because he failed to disclose to Dr. Popkess, with whom he had no contractual relationship at the time, the existence of the pledge of Archer No. 1 Limited's assets, which had been filed and made a public record. In permitting the Petitioner's conviction under these facts, without requiring proof of a relationship between the Petitioner and Dr. Popkess or the existence of duty on the Petitioner's part to make the disclosures required by the trial court's instructions, the lower court er-

roneously upheld as valid a statute that proscribes indefinite and unforseeable conduct inasmuch as no reasonable man can predict to whom and when he may owe a duty of disclosure absent a relationship of some sort with the person to whom the duty is owed. Statutes are void for vagueness when they fail to define conduct in sufficiently specific terms so that an individual can, by conforming his conduct to what the law requires, guard or protect himself against violating the statute. Where a statute's definition of a crime depends upon the subjective belief of a third person formulated after all relevant events have occurred, the statute is void for vagueness under the Fourteenth Amendment. *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972). That is precisely what resulted by the application of the Texas Securities Act to the facts of this case.

The conclusion reached by the Court of Appeals was skewed by an improper analysis of the issue. Contrary to the lower court's analysis, the question is not whether the statute's use of "material fact" as a basis for criminal liability is, standing alone, sufficient to furnish constitutional notice; rather, the test is whether the Petitioner was duty-bound under the facts of this case to take any action, irrespective of whether the pledge of the Archer No. 1 Limited assets was a "material fact." Only a failure to act when action is necessary can be made criminal, since the absence of a duty to act negates the existence of a culpable mental state . *Colautti v. Franklin,* 439 U.S. 379, 395 (1979). Moreover, the lower court failed to properly assess the statute's use of "material fact" as a basis for satisfying the constitutional requirement of notice. Not surprisingly, the lower court concedes, as it must, that the term "material fact" has no certainty. The question then is whether, in the context of this case, that term adequately furnished notice to the Petitioner. To hold, as did the Court of Appeals, that facts are "material" whenever an aggrieved

person testifies, after the criminative conduct is complete, (a) they are material or (b) that he would not have acted had he known what was not disclosed, does not furnish any notice. Such a standard is clearly at odds with the requirement that a criminal statute must clearly forbid some specific or definite act or course of conduct about which one need not guess or speculate in order to avoid its consequences. *United States v. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921).

Extraneous offense

Count 1 of the indictment in this case charged the Petitioner with engaging in the business of being a securities dealer without being registered, a violation of § 581-29(A) of the Texas Securities Act. At the time the indictment was returned, prosecution of the Petitioner for the alleged violation of that section was barred by limitation, there being no allegation tolling the statute of limitations.[2] His right to be free from prosecution upon this count was completed. Thus, the Petitioner stood in the same position as one acquitted of the offense as regards his criminal liability for the offense charged in Count 1.

Ashe v. Swenson, 397 U.S. 436 (1970), protects an accused against having to defend himself against charges a second time. Where an issue of ultimate fact has been tried and resolved between the parties, that issue is not open to relitigation. That doctrine has been applied not only where the state seeks to reprosecute an individual following an acquittal, *Brown v. Ohio*, 432 U.S. 161 (1977); *Turner v. Arkansas*, 407 U.S. 366 (1971), but also where the prosecution seeks to use acts of prior misconduct as evidence at his trial on another offense,

[2]The general three-year statute of limitations applies to all Securities Act violations, except the violations defined in § 581-29(C). *Cooper v. State*, 527 S.W.2d 563, 565 (Tex.Cr.App.1975).

United States v. Castro, 629 F.2d 456 (6th Cir.1980); *United States v. Mespoulede,* 597 F.2d 329 (2d Cir.1979); *United States v. Day,* 591 F.2d 861 (D.C.Cir.1978); *Wingate v. Wainwright,* 464 F.2d 209 (5th Cir.1972).

The rationale of *Ashe* and its progeny apply in cases such as this where an accused cannot legally be convicted of an offense which the prosecution uses as evidence against him at his trial. True, there has been no resolution of any ultimate issue of fact in favor of the Petitioner in this case; however, the legal effect of the statute of limitations, which is to bar any prosecution of the accused, furnishes the basis for the same result called for by the Fifth Amendment and *Ashe* by precluding any possible conviction. As noted by the Court of Appeals in *Wingate,* "there is no meaningful difference in the quality of 'jeopardy' " to which the Petitioner is subject when the state uses against him evidence that he committed a crime which the statute is barred from proving. See *Wingate v. Wainwright, supra,* 464 F.2d at 213.

Because the Petitioner was subjected to proof at his trial that he committed a crime for which he could not legally be tried and convicted, his rights under the Fifth Amendment were abridged. Given the jury's expressed desire to convict him of all counts, despite the trial court's instructions that it could not do so, and the jury's assessment of a lengthy sentence and maximum fine in a case where the Petitioner was eligible for probation, it cannot be concluded that the error allowing proof of the extraneous offense barred by limitation was harmless. Certiorari should be granted to allow for a decision of this issue.

Limitation

Statutes of limitation are uniformly viewed as acts of grace and amnesty, subject to the will of the legislature. Thus they may be changed or repealed without violating constitutional prohibitions. However, like any state-created right, statutes of limitation are subject to the requirement that, once adopted, they must be applied even-handedly, consistent with the requirements of due process. See, e.g., *Ross v. Moffitt,* 417 U.S. 600 (1974), and *Griffin v. Illinois,* 351 U.S. 12 (1956), reaffirming that while the states are not constitutionally required to provide appeals in criminal cases, appellate proceedings created under state law must be furnished in a manner consistent with the demands of the Due Process Clause of the Fourteenth Amendment.

Even though they are acts of grace, statutes of limitation are fundamentally important because they balance an individual's exposure to prosecution upon charges after basic facts have become stale against society's need for time to investigate and prosecute, *Toussie v. United States,* 397 U.S. 112, 114-115 (1970); *United States v. DiSantillo,* 615 F.2d 128 (3rd Cir. 1980); *Pate v. District Court of Oklahoma,* 414 P.2d 567 (Okla.Cr.App.1966), and serve a purpose co-extensive with the right to a speedy trial. Statutes of limitation on criminal prosecutions are "to be liberally interpreted in favor of repose," *Toussie v. United States, supra; State v. Fogel,* 492 P.2d 742 (Ariz.App.1972); *State v. King,* 275 So.2d 274 (Fla.App.1973); *Commonwealth v. Patterson,* 344 A.2d 710 (Pa.Super.1975), such that a presumption is indulged against retroactive application. *United States v. Richardson,* 393 F.Supp. 83 (D.C.Pa.1974), aff'd 512 F.2d 105 (3rd Cir.1975); *State v. Hemminger,* 502 P.2d 791 (Kan.1972).

Virtually every court called upon to address the issue has concluded that statutes of limitation vest substantive rights,

People v. Zamora, 557 P.2d 75 (Cal.1976); *Carcaise v. Durden,* 382 So.2d 1236 (Fla.1980); *In re State in Interest of B.H.,* 270 A.2d 72 (N.J.1970); *City of Cleveland v. Hirsch,* 268 N.E.2d 600 (Ohio App.1971), which cannot be changed by retroactive application of legislation, *Patrick v. Linebarger,* 576 S.W.2d 191 (Ark.1979); *State v. Russell,* 617 P.2d 84 (Hawaii 1980).

The Court of Appeals ignored all of the generally accepted principles stated above when it concluded that the 1983 amendment to the Texas Securities Act applied retroactively and thus did not bar the Petitioner's prosecution under § 581-29(C). It also ignored the Texas Legislature's clear expression that the five-year statute of limitations should not apply to the Petitioner.[3] The intent of the Texas Legislature expressed in the 1983 amendment of the Texas Securities Act was to follow the generally accepted practice of having the new statute of limitations apply prospectively.

The Texas Legislature was not obliged to enact a statute of limitations applicable to the Texas Securities Act; but, having done so, the Texas courts are obliged to apply that law even-handedly, consistent with the requirement of the Fourteenth Amendment. Past decisions regarding the application of statutes of limitation in Texas have consistently followed the

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[3]The 1983 act amending the Texas Securities Act contains the following recitations:

> (b) The amendments that this Act makes to Subsection C, Section 29, the Securities Act, as amended . . . apply only to an offense committed on or after September 1, 1983.
> * * *
> (d) A proceeding in which . . . an offense committed before September 1, 1983, . . . is governed by the law in effect at the time of the . . . offense, and that law is continued in effect for that purpose.

1983 Tex.Gen.Laws, ch. 465.

general practice of holding changes in those laws to apply prospectively only. The failure of the Court of Appeals to do just that is error of constitutional dimension. What is at issue here is not merely an interpretation of state law by a state court; rather, this question involves the obligation of a state court to apply state-conferred rights in a manner consistent with the requirements of the federal consitution.

A writ of certiorari should issue in this case to allow for review of whether the Texas Court of Appeals violated the Petitioner's rights under the Fourteenth Amendment by applying the newly enacted statute of limitations retroactivley.

PRAYER

For the reasons stated above, the Petitioner prays that this Court issue a writ of certiorari to review the judgment of the Texas Court of Appeals in this case, and to correct the errors in that court's opinion issued in this case.

Respectfully submitted,

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APPENDIX A

Ted A. ROSE, Appellant,
v.
The STATE OF TEXAS, Appellee.

No. 05-85-00849-CR

Court of Appeals of Texas
Dallas
Aug. 13, 1986

Rehearing Denied Sept. 23, 1986

Nathan K. Griffin, Dallas, for appellant.

Kathi Alyce Drew, Asst. Dist. Atty., Dallas, for appellee.

Before AKIN, SCALES and CARVER,[1] JJ.

AKIN, Justice

Ted A. Rose appeals his conviction for securities fraud for which he was sentenced to seven-and-one-half years' confinement in the Texas Department of Corrections and a five thousand dollar fine. For the reasons below, we affirm the conviction.

Appellant was President of First Texas Petroleum, Inc., a small oil and gas company. As president of the company, he entered into numerous limited partnership agreements for the purpose of drilling for oil and re-working existing oil and gas wells. In November of 1980, appellant put together a limited partnership called the Archer No. 1 Limited, in Archer Coun-

[1] The Honorable Spencer Carver, Justice, retired, Court of Appeals, Fifth District of Texas at Dallas, sitting by assignment.

ty, Texas. Five investors put up letters of credit for their initial limited partnership investment.

Appellant, as president of First Texas Petroleum, Inc., (the general partner in the Archer limited partnership), obtained a loan from First Wichita National Bank. As security for the loan, appellant executed (in September of 1981) a Deed of Trust conveying the leasehold interest in Archer and also filed a UCC-1 financing statement for the drilling equipment. On November 5, 1981, Dr. Popkess, the complainant, purchased one of the five original limited partnership interests in Archer. There is evidence that appellant failed to disclose the deed of trust and financing statement to Dr. Popkess. Six months later, appellant stopped making payments on the loan, and the bank foreclosed on Archer No. 1 Limited.

Appellant was indicted on four counts of securities fraud under the State Securities Act,[2] as it existed prior to its 1983 amendment. The jury found appellant guilty of fraud on count number two for intentionally and knowingly failing to disclose a material fact, under article 581-29(C).

Statute of Limitations

Appellant contends in his first and second grounds of error that the indictment was fundamentally defective because it was not presented within three years of the commission of the offense. We cannot agree.

The offense occurred on November 5, 1981. At that time, the applicable statute of limitations was three years. *See* TEX. CODE CRIM.PROC.ANN. art. 12.01(4) (Vernon 1977). Before the three year limitations expired for appellant's of-

[2] All citations are to the Securities Act, TEX. REV. CIV. STAT. ANN. arts. 581-1 to 581-39 (Vernon 1964) and (Vernon Supp. 1986), unless otherwise indicated.

fense, the Legislature amended article 581 by adding sectin 29-1, extending the limitations period to five years, effective September 1, 1983. Securities-Regulation State Securities Board, and Securities Commissioner-Miscellaneous Provision, ch. 465 § 1, 1983 Tex.Gen.Laws 2710. The State then indicted appellant under four counts for violations of article 581-29(A) and (C) cn September 21, 1984. Because this first indictment was defective for other reasons, the State reindicted appellant on June 28, 1985. The State proceeded to trial on the second indictment, which was presented three-and-one-half years after the offense.

Appellant argues that the three-year statute of limitations applies rather than the five year period. Consequently, he contends that, because the second indictment did not allege tolling under the first indictment, the State was barred by the three-year statute of limitations and thus the indictment was fundamentally defective. We disagree because we hold that the five-year limitation period applies in this case.

When enacted, statutes of limitations are construed as being acts of grace and as a surrender by the sovereign of its rights to prosecute at its discretion; they are considered acts of amnesty. *Vazquez v. State*, 557 S.W.2d 779, 781 (Tex.Crim. App.1977). Statutes of limitations, being measures of public policy only, are entirely subject to the will of the Legislature and may be changed or repealed without violating constitutional prohibitions against ex post facto laws in any case where the right to acquittal has not been absolutely established by lapse of the period of limitation. *Id.* at 782. Where a complete defense has accrued under a statute of limitations, it cannot be taken away by subsequent repeal or amendment; however, a statute extending the period of limitations applies to all offenses not barred at the time of the passage of the act, so that the prosecution may be commenced at any time within

the newly established period, although the old period of limitation has expired. *Archer v. State,* 577 S.W.2d 244 (Tex. Crim.App.1979). Here, the three-year limitation period had not expired prior to the passage of the 1983 amendment. Therefore, the five-year-limitation period is applicable, and the second indictment was timely presented.

Appellant contends that the 1983 amendments to the Securities Act specifically state that the five-year limitation period applies only to those offenses committed after the effective date of the amendment. He cites section 7 of the 1983 amendments:

> (b) The amendments that this Act makes to Subsection C, Section 29, the Securities Act, as amended, apply only to an offense committed on or after September 1, 1983.

ch. 465 § 7, 1983 Tex.Gen.Laws 2717. We do not read this language as applying the five-year limitation period prospectively. Instead, this language refers to the amendments to article 581-29(C), which extend the minimum prison term and fines for a conviction under section 29(C). Section 7 of the amendments merely restates that substantive law may not be modified and applied ex post facto. In this respect, section 7 does not specifically refer to section 29-1, which was added to the Securities Act in the 1983 amendments and which extends the limitations period from three to five years. Section 29-1 is procedural in nature, as distinguished from the amendments to section 29(C), and, therefore, may be applied to offenses occurring before the effective date of the amendments. Under *Archer* and *Vasquez* the section 29-1 limitations are applicable to this case. Consequently, we hold that the second indictment was not barred by limitation and that the indictment was not fundamentally defective. Accordingly, we overrule appellant's first and second grounds of error.

Constructive Notice

In four grounds of error, appellant asserts that the evidence adduced at trial was insufficient to support his conviction. Specifically, he argues that because the deed of trust and UCC-1 statement were filed in the public records of Archer County, Texas, Dr. Popkess had constructive notice of the fact that appellant had previously secured a loan from the First Wichita National Bank against the Archer No. 1 Ltd. oil and gas lease. He contends that this "constructive notice" effectively negates his intent to commit fraud, thereby rendering the evidence of his guilt insufficient. We disagree.

We hold that the doctrine of constructive notice, as it applies to real property records, is inapplicable in criminal securities fraud cases. That doctrine goes only to the validity of a deed and operates against one seeking to challenge the validity of that deed. The rule is primarily applicable to a creditor seeking to have a conveyance set aside, *see Perry v. Brown*, 76 S.W.2d 230 (Tex.Civ.App.—Waco 1934, no writ), and to a purchaser of realty under a deed conveying land, *see Farmer's Mutual Royalty Syndicate v. Isaacks*, 138 S.W.2d 228, 231 (Tex.Civ.App.—Amarillo 1940, no writ), and would run to subsequent claims threatening the chain of title to that land. It does not apply to one, charged with a duty to disclose material facts, who fails to perform that duty.

In support of his contention, appellant relies upon cases holding that oil and gas leases are not securities but rather are interests in real estate. *Allen v. Sorenson*, 388 S.W.2d 757, 759 (Tex.Civ.App.—Beaumont 1965, writ ref'd n.r.e.); *Culver v. Cockturn*, 127 S.W.2d 328, 330 (Tex.Civ.App.—Galveston, 1939, writ dism'd). Appellant's reliance is misplaced. These cases relate to the purchase and sale of the lease itself and are distinguishable from those cases holding that an

assignment of an oil and gas lease constitutes a security subject to the Texas Securities Act. *Herren v. Hollinsworth*, 140 Tex. 263, 167 S.W.2d 735, 738 (1943); *Kadane v. Clark*, 135 Tex. 496, 143 S.W.2d 197, 199 (1940); *Muse v. State*, 137 Tex.Crim. 622, 132 S.W.2d 596, 597 (1939); *see also Howard v. Simmons*, 285 S.W.2d 478, 480 (Tex.Civ.App.—Dallas 1955, writ ref'd n.r.e.).

Moreover, even if it can be said that the doctrine of constructive notice could be applied to bar recovery by Dr. Popkess in a civil action, the doctrine cannot be said to extend to the State in a criminal prosecution. The State is not seeking to recover damages, title, or any form of injunctive relief. Rather, the State is seeking to protect the public. *See Kadane*, 143 S.W.2d at 199; *see also Enntex Oil & Gas Co. (of Nevada) v. State*, 560 S.W.2d 494, 497 (Tex.Civ.App.—Texarkana 1977, writ ref'd n.r.e.). The doctrine of constructive notice was not intended to bar the State from showing fraud in the sale of securities.

Finally, we hold that the evidence was sufficient to show an intent to commit fraud by knowingly and intentionally failing to disclose a material fact. Appellant, acting through First Texas Petroleum, Inc., obtained the bank loan, secured by a mortgage on the leasehold and a UCC-1 filing on the equipment after he had sold the initial limited partnership interests. None of the original five investors were informed of these encumbrances. One investor testified that appellant never informed him as to the mortgage and UCC-1 filing and that he would have wanted to know this information. Dr. Popkess testified that appellant did not disclose the mortgage or UCC-1 encumbrances to him, that he would have wanted to know this information, and that he would not have invested had he known of these encumbrances. From this evidence and from the surrounding circumstances, the jury could reasonably in-

fer intent to commit fraud. *See Pinkerton v. State,* 660 S.W.2d 58, 60 (Tex.Crim.App. 1983); *Jones v. State,* 687 S.W.2d 430, 432 (Tex.App.—Houston [14th Dist.] 1985, no pet.). Accordingly, we overrule appellant's third, fourth, fifth, and sixth grounds of error.

Unconstitutionality of the Statute

Appellant contends in his seventh ground of error that the trial court erred in denying his motion for an instructed verdict because article 581-4(F) is vague and overbroad in violation of article 1, section 19 of the Texas Constitution. Appellant was indicted and convicted under article 581-29(C)(1) which makes the act of engaging in "fraud" illegal. "Fraud," as defined in article 581-4(F), includes an "intentional failure to disclose a material fact." We hold that article 581-29(C)(1) as it applies the definition of "fraud" in article 581-4(F) is not unconstitutionally vague or overbroad.

In determining vagueness challenges to statutes which do not concern First Amendment freedoms, we must examine the statute in light of the facts of the case at hand. *U.S. v. Powell,* 423 U.S. 87, 92, 96 S.Ct. 316, 319, 46 L.Ed.2d 228 (1975). It is not a proper basis for finding a statute unconstitutionally vague that the statute could have been written more definitely or precisely. *Id.* at 94, 96 S.Ct. at 320; *U.S. v. Petrillo,* 332 U.S. 1, 7, 67 S.Ct. 1538, 1541, 91 L.Ed. 1877 (1947). Instead, the language used must only "[mark] boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of the [legislature]." *Petrillo,* 332 U.S. at 7, 67 S.Ct. at 1541. Thus, there may be some "element of degree in the definition as to which estimates might differ . . . for reasons found to result either from the text of the statutes involved or the subjects with

which they dealt." *Connally v. General Const. Co.*, 269 U.S. 385, 391-92, 46 S.Ct. 126, 127-28, 70 L.Ed. 322 (1926). Thus, in our review of the use of "material fact" in this case, we need not require absolute certainty of the meaning of the words used. Rather, we must see if a person of ordinary intelligence would have fair notice that the conduct in this case would be forbidden by the statute. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972).

We have previously held article 581-29(C)(1) to be constitutional in a case concerning an omission to disclose a material fact. *Huett v. State*, 672 S.W.2d 533, 540 (Tex.App.—Dallas 1984, pet. ref'd). *See also Morgan v. State*, 557 S.W.2d 512, 514 (Tex.Crim.App.1977). In *Huett* we held that, viewed in light of the circumstances of that case, the term "material fact" was not unconstitutionally vague. *Huett*, 672 S.W.2d at 539. In *Huett*, the defendant seller of securities failed to disclose three prior felony theft convictions, all of which were pending on appeal. Furthermore, the defendant was the senior executive officer in charge of the corporation whose stock was being offered for sale. We held there that, viewed in light of common understanding and practices in selling securities, any seller of securities would "be well aware" that the convictions were material facts which should be disclosed. *Huett* is controlling here.

In this case, appellant failed to disclose that the oil and gas lease was mortgaged and that the equipment on the lease was secured by a UCC-1 filing. Dr. Popkess testified that this information was something that he would have wanted to know before he invested in the limited partnership. Further, the doctor testified that he would not have invested had he known of the mortgage on the property. Indeed, any investor would have wanted to know the existence of the mortgage. Viewed in light of common understanding and practices in selling

securities, any seller of securities would "be well aware" that the existence of a mortgage is a material fact which should be disclosed. Accordingly,we over-rule appellant's seventh ground of error.

Admission of Evidence

Appellant contends in his eighth and ninth points of error that the trial court abused its discretion in admitting certain State's exhibits and in admitting the expert testimony of Kenneth Huff because the exhibits and testimony were not relevant or material to any fact in issue, and the prejudicial nature of the evidence outweighed their probative value.

With respect to the expert testimony, generally opinion testimony is inadmissible. But if the jurors are not competent to infer, without the aid of greater skill than their own, the probable existence of the facts to be determined from other facts actually proved, expert opinion evidence is rendered admissible. *Holloway v. State,* 613 S.W.2d 497, 500 (Tex.Crim. App.1981). Admission of an expert's opinion is dependent on the offering party's showing that the testimony is appropriate because of the unfamiliarity of jurors with a body of expertise relevant to the resolution of the litigation. *Id.* at 502.

Here, Kenneth Huff, Chief of Staff Services for the State of Texas Securities Board in Austin, was called as a witness for the State. Huff was asked to analyze some of appellant's business and banking records. His testimony summarized banking transactions from 1980 to 1982, in order to show the misapplication and commingling of funds, testimony relative to counts three and four of the indictment. Huff also expressed, in his opinion as an expert, that appellant was engaged in a "Ponzi scheme." Considering the complex financial tran-

sactions involved, we hold that the trial court did not abuse its discretion in admitting Huff's testimony.

Appellant next contends that the exhibits and Huff's testimony were inadmissible as an attempt to show extraneous offenses not alleged in the indictment. He also argues that several exhibits were admitted with no testimony or explanation as to their relevance. We cannot agree. Extraneous offenses are admissible if shown to be relevant to a material issue in the case and if that relevancy value outweighs its prejudicial effect. *Moreno v. State*, No. 69, 268, May 28, 1986 (Tex.Crim. App.1986) (not yet reported). These conditions need not be met if the extraneous offense is part of a continuous episode or so closely interwoven with the offense being tried. In this situation the extraneous offense is admissible on the ground that the jury is entitled to know all of the relevant surrounding circumstances of the charged offense. *Mitchell v. State*, 650 S.W.2d 801, 811 (Tex.Crim.App.1983).

We now turn to the exhibits admitted over objection. All of the exhibits complained of were used to aid Huff in his testimony concerning appellant's intricate banking transactions, even though not all documents were specifically referred to by Huff during his testimony. The tenor of Huff's testimony was to show a unique pattern of the flow of deposits and withdrawals from appellant's bank accounts revealing commingling and misapplication of investors' funds. Thus, these exhibits which show extraneous offenses were admissible because they show the surrounding circumstances of the offense charged and they are a part of a continuing episode of conduct. Consequently, no error is presented.

Furthermore, the admission of Huff's testimony and the admission of the documents even if error is not reversible er-

ror. In determining harmless error, the question is whether there is a reasonable possibility that the inadmissible evidence might have contributed to either the conviction or to the punishment assessed. *See Plante v. State*, 692 S.W.2d 487, 495 (Tex.Crim.App.1985). Neither the admission of Huff's testimony, nor the exhibits attendant thereto, contributed to the conviction because appellant was not convicted under the counts of commingling or misapplication of funds. Rather, appellant was convicted for failure to disclose the mortgage on the Archer #1 property to Dr. Popkess. In the latter respect, there was direct evidence of appellant's guilt in that both the existence of the mortgage and the failure to disclose the existence of the mortgage was shown, which was a material fact to Dr. Popkess. Since Huff's testimony and the exhibits did not relate to the existence of the mortgage or to the failure to disclose the mortage as an inducement to invest in the security, it cannot be said that there was a reasonable possibility that any of this evidence contributed to the conviction or to the punishment assessed so as to be harmful. Accordingly, we overrule appellant's eighth and ninth grounds of error.

Affirm.

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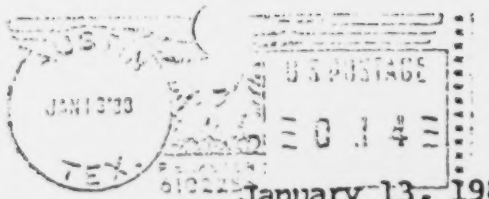

RE: Case No. 1185-86
STYLE: Rose, Ted A.

January 13, 1988

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

COA#: 05-85-00849-CR

Thomas Lowe, Clerk

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APPENDIX B